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In Reply Refer to:
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In re: KPPC(FM), Pocatello, Idaho
Facility ID No. 87656
BPH-19970724MI

Dear Counsel:

This letter concerns a request by InterMart Broadcasting Pocatello, Inc. ("InterMart") for tolling of the referenced permit's construction deadline pursuant to Section 73.3598(b)(ii) of the Commission's rules.¹ InterMart states that it has been prevented from building due to a pending Application for Review. Idaho Wireless Corporation ("IWC") filed comments to InterMart's request, and InterMart filed a reply. For the reasons discussed below we find that InterMart should receive additional construction time, but less than it requested.

InterMart and IWC both participated in Closed Broadcast Auction No. 25. InterMart was the high bidder for Pocatello, Idaho and IWC was the second-highest bidder. IWC filed a petition to deny InterMart's application, alleging that InterMart should not have been allowed to participate in the closed auction due to an alleged real-party-in-interest issue. The staff denied the petition, and subsequently, IWC's petition for reconsideration of that initial decision. On May 19, 2003, IWC filed an Application for Review, which remains pending. On that same May 19, 2003, date the staff granted the KPPC(FM) construction permit for a three-year term expiring May 19, 2006.² The concurrent timing of the construction permit and Application for Review stems from a Commission policy directing the staff to grant auction-related applications upon full payment of the winning bid, provided that the staff has acted on all petitions to deny.³

¹ See 47 C.F.R. § 73.3598(b)(ii).

² InterMart also has a pending application to modify the permit. IWC filed an informal objection to that application.

³ See *Abundant Life, Inc.*, 17 FCC Rcd 4006, 4007 n.5 (2002). See also 47 C.F.R. § 73.5006(d).

InterMart filed a request for tolling on December 19, 2005, arguing that the KPPC (FM) permit is the subject of administrative review. IWC takes no position on whether tolling is appropriate. IWC argues, however, that any additional time must be as short as possible because construction delays deprive the public of service. IWC states that “if the concern is that InterMart’s investment will be destroyed if it constructs KPPC only to lose the license when IWC’s Application for Review is granted . . . IWC will offer to purchase the transmitter, antenna, and associated equipment.”⁴

Discussion. The Commission’s rules provide for tolling of the broadcast construction period when construction is prevented by “administrative review,” which the rules define as “petitions for reconsideration and applications for review of *the grant* of a construction permit.”⁵ The instant Application for Review does not directly challenge the grant of the InterMart construction permit. Nevertheless, in the event that the Commission grants review, it would be required to rescind the grant of the construction permit and designate InterMart’s application for hearing. Accordingly, InterMart’s circumstances are sufficiently similar to administrative review to justify tolling.

Having determined that tolling is appropriate, we must determine its appropriate length. InterMart argues that no part of its three-year construction period has yet run and that the three-year period should begin upon resolution of the pending Application for Review. IWC contends that a significant portion of InterMart’s construction period has already run as a result of InterMart’s failure to file a timely tolling notification. IWC believes that InterMart can receive no more than 151 days – equivalent to the time between InterMart’s December 19, 2005, notification and the permit’s May 19, 2006, expiration date.

Tolling or waiver of a station’s construction period is triggered by a notification from the permittee; such action does not occur automatically.⁶ The notification requirement serves to ensure permittee construction diligence and to avoid *post hoc* permittee temporizing.⁷ InterMart’s tolling request was late by approximately two and one-half years. Under such circumstances, we would ordinarily begin tolling or waiver treatment 30 days prior to the permittee’s notification.

InterMart requests a waiver of the timely notification requirement because InterMart believed that it would have sufficient time to construct by the original construction deadline. It argues that it could not have predicted that the Application for Review would remain unresolved for such a long time. Additionally, InterMart contends that the purpose of the notification requirement is to inform the Commission of events external to the agency whereas the Commission has always been fully aware of the Application for Review.

We do not find good cause for a waiver of the timely notification requirement. The requirement was established to remedy various problems with the Commission’s enforcement of broadcast station construction requirements.⁸ The notification process is simple, and can generally be accomplished by means of a short letter. The Commission did not limit the requirement of timely notification to matters

⁴ IWC Comments at 2.

⁵ 47 C.F.R. § 73.3598(b)(ii) (emphasis added).

⁶ See 47 C.F.R. § 73.3598(c).

⁷ See *Birach Broadcasting*, 18 FCC Rcd 1414, 1416 (2003).

⁸ See *Streamlining MO&O*, 14 FCC Rcd at 17539.

outside of the agency. Indeed, the Commission specifically required notification of the commencement and termination of administrative review, which by definition is limited to matters pending within the Commission.⁹ While the Commission is certainly aware of matters within the agency, it cannot be expected to infer whether and to what extent such matters may impact the construction plans of a permittee.¹⁰ InterMart waited approximately two and one-half years to notify the Commission, and supplies reasons which do not justify the lengthy waiver requested. Accordingly, we have granted InterMart additional time beginning on November 19, 2005 – the earliest date for which its December 19, 2005, notification can be considered timely. At that time, six months remained in the station’s construction period. Those remaining six months will begin to run upon resolution of the matters now before the Commission in the IWC Application for Review.

Accordingly, InterMart’s December 19, 2005, request for tolling IS GRANTED to the extent discussed herein. InterMart SHALL FILE status updates every six months, and immediately upon resolution of the IWC Application for Review.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁹ See 47 C.F.R. § 73.3598(c) and (d). *Streamlining MO&O*, 14 FCC Rcd at 17541.

¹⁰ See generally *Bembenista v. U.S.*, 866 F.2d 493 (D.C. Cir. 1989) (dismissing Federal Tort Claims Act claim allegedly contained in documents submitted with a different claim because “to ask an agency to contemplate the nuances of every sentence in such a submission would hold it to a standard that even a court would be pressed to match.”); Instructions to FCC Form 303-S, page 7, Item 4 (license renewal applicant must report to the Commission all Commission determinations of rule violations by the station to enable determination of whether the violations preclude renewal under 47 U.S.C. § 309(k). Compare *WWOR-TV, Inc.*, 6 FCC Rcd 193, 206 (1990); *Superior Broadcasting of California*, 94 F.C.C.2d 904, 910 (Rev. Bd. 1983) (no motive for misrepresentation when facts allegedly concealed are a matter of public record available to the Commission).